

REMARKS

The Amendment, which is filed in response to the Final Office Actions mailed December 23, 2009 and Advisory Action mailed April 2, 2009, is believed to be fully responsive to the issues raised and discussed in the above Actions. Favorable reconsideration and allowance of the application is respectfully requested.

Formal Matters and Withdrawn Rejections/Objections

Applicant thanks the Examiner for entering and considering the Amendment filed March 23, 2009.

Applicant further thanks the Examiner for withdrawing the objection of claims and the rejection of claims under 35 U.S.C. § 112, second paragraph, in view of Applicant's amendments and arguments.

Response to the Rejection under 35 U.S.C. § 112, first paragraph

In the Final Office Action and Advisory Action, claim 13 is maintained rejected as it allegedly failing to comply with the written description requirement.

Without acquiescing the rejection or commenting thereon, solely in order to advance the rejection, claim 13 is canceled without prejudice or disclaimer, rendering the rejection moot.

Withdrawal of the rejection is respectfully requested.

Response to the Rejection under 35 U.S.C. § 103

In the Actions, claims 5, 6, and 8-13 stand rejected under 35 U.S.C. § 103, as assertedly being obvious over Castberg *et al.* (US 5,453,256, “R1”) in view of Kamiya (EP 1 082 907, “R2”). In this regard, Applicant appreciates the detailed discussions in response to the Applicant’s arguments, presented in the Advisory Action.

In the Advisory Action, the Office argues that the Applicant’s arguments that one skilled in the art would not have been motivated to combine R1 with R2 is not persuasive.

Applicant does not agree and reiterates arguments stated in the Amendment filed March 23, 2009. In addition, in order to advance the prosecution, Applicant submits a Rule 132 Declaration showing unexpected superior results of the method for producing fermented milk and fermented milk produced by the method. The Rule 132 Declaration is executed by Mr. Hiroshi Horiuchi.

As can be seen in the Rule 132 Declaration, experiments were performed under the conditions defined in the claims of the instant application and comparative conditions. In particular, an Additional Experiment according to the present invention (substitution with nitrogen) was conducted in order to show the unexpected effects of the invention in commensurate with the scope of the claimed subject matter.

Additional Experiment According to the Present Invention (substitution with nitrogen)

A mix was prepared by mixing 78.2 kg of milk, 2.6 kg of powdery skim milk, and 17.2 kg of water. The mix was sterilized under heating at 95°C for 5 minutes, and cooled to 37°C. Subsequently, a lactic acid starter (a mix culture of *Lactobacillus bulgaricus* (*L. bulgaricus* JCM 1002T) and *Streptococcus thermophilus* (*S. thermophilus* ATCC 19258)) was inoculated at 2%

by weight. Nitrogen gas was mixed and dispersed into the mix through a pipe, to adjust a dissolved oxygen concentration to about 2 ppm. Then, the mix was packed into a 100-ml container, for static fermentation in fermentation chamber at 37°C, until the lactic acid acidity reached around 0.7%. Just then, the resulting product was put in a refrigerator at 10°C or less, for cooling and termination of fermentation to prepare fermented milk. In this regard, the lactic acid acidity was calculated by the titration with 0.1 N NaOH by using phenolphthalein as an indicator.

Additional Comparative Experiment (substitution with carbon dioxide)

Additional Comparative Experiment was conducted in the same manner as in Additional Experiment according to the present invention described above, except that carbon dioxide was used instead of nitrogen. The dissolved oxygen concentration was adjusted to about 2 ppm, also as in Additional Example of the present invention.

With regard to the conditions of comparative experiments, Mr. Horiuchi explains that the start culture used in this Comparative Experiment is not identical to that used in Example IV of RI, because he believes that the Comparative Experiment conditions as employed are closer to the conditions of the above Additional Experiment according to the present invention and thus is more suitable for comparison for proving unexpected results of the present invention.

In addition, Applicant notes that “Applicant cannot be required to compare the claimed invention with an invention suggested by a combination of references relied upon by the Examiner in a 103 rejection. This would be “requiring comparison of the results of the invention with the results of the invention.” In re Chapman, 357 F.2d 418, 148 USPQ 711 (CCPA 1966).

Therefore, Applicant respectfully submits the conditions employed in the Comparative Experiment are reasonable and appropriate for the purpose of assessing the superior effects of the method and its product defined in the claims.

Results

- (1) Fermentation time (time required to reach lactic acid acidity of 0.7%)

Additional Experiment according to the present invention : 170 min (pH at the start of fermentation = 6.53, acidity = 0.19%)

Additional Comparative Experiment: 170 min (pH at the start of fermentation = 6.07, acidity = 0.30%)

At the finish of fermentation, pH was 4.80 and acidity was 0.70% in each of Additional Experiment according to the present invention and Additional Comparative Experiment.

- (2) Curd tension (standard of hardness)

Additional Experiment according to the present invention : 50.0 g

Additional Comparative Experiment: 48.5 g

- (3) Penetration angle of curd knife (standard of smoothness)

Additional Experiment according to the present invention: 27°

Additional Comparative Experiment: 55°

As shown by the data presented in Rule 132 Declaration and reproduced above, when carbon dioxide was used, it was not possible to produce fermented milk having sufficient smoothness.

- (4) Organoleptic assessment

According to the organoleptice assessment results, the smoothness of the fermented milk of the Additional Experiment according to the present invention was far excellent than that of the fermented milk of Additional Comparative Experiment. In addition, Mr. Horiuchi confirmed that the fermented milk of Additional Comparative Experiment gave a tartish taste which is considered to be derived from carbonic acid.

From the results obtained and compared above, Mr. Horiuchi concludes that the method for producing fermented milk and thus produced fermented milk, defined in the claims of the instant application, show unexpected results.

Accordingly, Applicant believes that the rejection is not sustainable and withdrawal of the rejection is respectfully requested.

AMENDMENT UNDER 37 C.F.R. § 1.114(c)
Attorney Docket No.: Q88366
Application No.: 10/537,493

Conclusion

In view of the above, reconsideration and allowance of this application are now believed to be in order, and such actions are hereby solicited. If any points remain in issue which the Examiner feels may be best resolved through a personal or telephone interview, the Examiner is kindly requested to contact the undersigned at the telephone number **202-775-7588**.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,

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